

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KENNETH MOODY,	)	
	)	
Petitioner,	)	CASE NO. C04-1805C
	)	(CR00-79C)
v.	)	
	)	
UNITED STATES OF AMERICA,	)	REPORT AND RECOMMENDATION
	)	
Respondent.	)	
_____	)	

INTRODUCTION

Petitioner has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The government has filed a response, raising the statute of limitations as a bar to the court's consideration of petitioner's motion. Because the government is correct in its argument, petitioner's motion should be dismissed as untimely pursuant to 28 U.S.C. § 2255(3).

PROCEDURAL HISTORY

Petitioner pled guilty to bank robbery and was sentenced on July 14, 2000 to 92 months of imprisonment. Petitioner appealed to the Ninth Circuit and that court affirmed his conviction on June 21, 2001. *See United States v. Kenneth Moody*, 12 Fed. Appx. 563 (Memorandum Disposition, 9<sup>th</sup> Cir. 2001). Petitioner filed the instant motion under § 2255 on August 13, 2004. (Doc. #1). After receiving a single extension of time, respondent filed its response on January 28, 2005 (Doc. #11); petitioner has not filed a reply.

DISCUSSION

In his § 2255 motion, petitioner raises a single claim for relief. He argues that his Sixth Amendment rights were violated when the court used factors to enhance his sentence which had not been found by a jury. (Doc. #1). For support, petitioner relies upon the Supreme Court decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004).<sup>1</sup>

In its response, the government argues first that petitioner's motion is untimely and therefore barred from review. In addition, the government argues that even if timely, petitioner's claim is procedurally defaulted and therefore is not susceptible to review via a § 2255 motion. For the reasons set forth below, the court finds that the government's position on the timeliness question is correct, and the court therefore does not address the government's alternative arguments.

Motions filed pursuant to 28 U.S.C. § 2255 are governed by the one-year statute of limitations provided in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This one-year statute of limitations begins to run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) *the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review*; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (emphasis added).

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<sup>1</sup> Although petitioner relies upon *Blakely*, that case applied only to the Washington state sentencing scheme, not the federal sentencing guidelines under which petitioner was sentenced. After petitioner filed the instant motion, the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), which applied *Blakely's* principle – that sentencing enhancements must be based upon either an admission by the defendant or a finding by a jury – to federal sentences.

